FILED
JUL 3 1991
OFFICE OF THE CLERK

(2)

No. 90-1852

In The

Supreme Court of the United States

October Term, 1991

COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF TAXATION,

Petitioner,

v.

CORNING, INC.,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

*JOHN M. WOOD
DANIEL K. STEEN
MICHAEL D. SMITH
REED SMITH SHAW & MCCLAY
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-6100
*Counsel of Record
for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a state must apply this Court's precedent in deciding whether a unitary business exists for purposes of taxing capital gains and interest income received by a nondomiciliary corporation from the sale of a passive, long-term investment in a corporation which it did not operate, and was barred by court decree from operating?

LIST OF PARTIES

The Petitioner in this case is the Commonwealth of Virginia, Department of Taxation, an agency of the Commonwealth of Virginia. The Respondent is Corning, Inc. ("Corning"), formerly Corning Glass Works, Inc.

Pursuant to Supreme Court Rule 29.1, the Court is advised that Corning has no parent corporation. Corning has interests in wholly-owned subsidiaries and the following subsidiaries which are not wholly-owned: Corning France, S.A. (France), Corning S.p.A. (Italy), QVF Glastechnik GmbH (Germany), Corning Asahi Video Products Company (New York), Hazelton France (France), PCO, Inc. (Delaware), Siecor Corporation (Delaware), MerriCor, Inc. (Washington), Compania de Fibre Optica Telcor, S.A. (Spain), Dow Corning Corporation (Michigan), Pittsburgh Corning Corporation (Pennsylvania), Pittsburgh Corning Europe N.V. (Belgium), Pittsburgh Corning (U.K.) Ltd. (United Kingdom), Samsung-Corning Corporation, Ltd. (Korea), Siecor GmbH (Germany), N-Cor, Ltd. (Japan), Glass Technologies Ptc. Ltd. (Singapore), Sicover, S.A. (France), Optical Fibres (United Kingdom), Siecor GmbH & Co. KG (Germany), Shanghai Corning Engineering Corporation, Ltd. (Peoples Republic of China), Optical Waveguides Australia Pty. Ltd. (Australia), Steuben Partners, L.P. (Connecticut), Fairfield Venture Partners II, L.P. (Connecticut), Corporate Venture Partners (Delaware), International Hua-Mei Glass Engineering Co., Ltd. (Peoples Republic of China), Hazleton Clinical Research Institute, Inc. (Delaware), Iwaki-Corning (Malaysia) Sdn. Bhd. (Malaysia), Unilab Corporation (Colorado), CAPL S.p.A. (Italy), Eurokera S.N.C.

LIST OF PARTIES – Continued

(France), Moduletec SARI (France), Morgane S.A. (France), Newco Partnership (Ohio), Corsam Glasstec R&D Center (Delaware), Samcor Glass Limited (India), Daehan Specialty Chemical Co. (Korea), Watkins Glen International, Inc. (New York), Cornetech, Inc. (Delaware), TEFOSA (Spain), and Doane Associates (Michigan).

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Petition For Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Petition for a Writ of Certiorari ("Petition") filed by the Commonwealth of Virginia, Department of Taxation ("Department") seeks review of a 7-0 decision of the Supreme Court of Virginia. That decision held that this Court's ruling in *ASARCO, Inc. v. Idaho State Tax Commissioner*, 458 U.S. 307 (1982) continues to be the controlling law to be applied in determining whether, for purposes of taxation, a unitary business exists. The Court applied those principles to the unique facts of this case and correctly concluded that a unitary business did not exist and could not have existed.

STATEMENT OF THE CASE

Corning is a New York State corporation with corporate headquarters located in Corning, New York. The Supreme Court of Virginia's opinion sets forth the facts of Corning's passive investment in Owens-Corning Fiberglas ("OCF") and demonstrates that, since 1949, Corning was legally prohibited from exercising, and did not, exercise any control over OCF.[1] Corning incorporates by reference the facts as stated in the opinion below. The Supreme Court of Virginia thoroughly examined Corning's investment in light of the development of the "unitary business" principle through several decisions of this Court.[2] The Supreme Court of Virginia unanimously ruled that "[a]n examination of the underlying activity between [Corning] and [OCF] makes it exceedingly clear that a unitary business relationship did not exist and legally could not have existed in view of the judgment order entered in the antitrust case."[3]

REASONS FOR DENYING PETITION

As a result of this Court's decisions in *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207 (1980), *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425

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[1] Appendix to Petition at 1-4, 11-13.

[2] Appendix to Petition at 5-10.

[3] Appendix to Petition at 13. The Department's assertion that the Supreme Court of Virginia effectively placed the burden on the state to prove that a unitary business existed between Corning and OCF, Petition at 8, 22, is inaccurate.

(1980), *ASARCO, supra, F.W. Woolworth Co. v. Taxation and Revenue Dept.*, 458 U.S. 354 (1982) and *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983), "[t]he legal principles defining the constitutional limits on the unitary business principle are now well established." *Container Corp.*, 463 U.S. at 176. Recognizing that the factual records involved in applying constitutional principles to "unitary business" determinations "tend to be long and complex," this Court has expressed an intention not to review "every colorable claim that a state court erred in a particular application of those principles," but rather to accept state court judgments that are "within the realm of permissible judgment." *Id.* at 176 (footnote omitted).[4]

I. The Supreme Court Of Virginia Made A Fact-Specific Determination That Does Not Conflict With Any Decisions Of Other State Courts Of Last Resort.

The Supreme Court of Virginia properly applied the precedents of this Court to the facts before it. The Department's suggestion notwithstanding, there is no conflict between the Supreme Court of Virginia's application of *ASARCO* and other precedents of this Court to the facts before it and the application by other state courts of those same precedents to the facts before them. State courts have uniformly looked to this Court's decision in *ASARCO* as controlling precedent. In some cases, the examination of the particular facts before other state courts have led them to determine that such cases are beyond the bounds of

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[4] *See also* Petition at 11.

ASARCO. But the difference in outcome occasioned by this case-by-case factual analysis, was expressly anticipated by this Court in *ASARCO,supra*, 458 U.S. at 315, and is due to differences of factual underpinning, not to differences among state courts in their view of the legal principles involved.

The Supreme Court of Virginia ruled upon the facts of this case. Given the Supreme Court of Virginia's thorough and accurate analysis, it would be inappropriate to grant the Petition, and would be directly contrary to this Court's statement that it would "if reasonably possible, defer to the judgment of the state courts in deciding whether a particular set of activities constitutes a 'unitary business.' " *Container Corp., supra*, 463 U.S. at 175.

The Department erroneously asserts that there are four decisions by state courts of last resort which conflict with the decision of the Supreme Court of Virginia.[5] However, each of these cases applied this Court's analysis in *ASARCO* and related cases to the peculiar facts before them, and their analyses of *ASARCO* do not conflict with this case. Three of those cases, *Lone Star Steel Co. v. Dolan*, 668 P.2d 916 (Colo. 1983), *NCR Corp. v. Comptroller of the Treasury*, 313 Md. 118, 544 A.2d 764 (1988), and *Silent Hoist & Crane Co. v. Director*, 5 N.J. Tax 242 (N.J. Tax 1983), *aff'd*, 6 N.J. Tax 348 (N.J. Super, A.D. 1984), *rev'd* 100 N.J. 1, 495 A.2d 775, *cert. denied*, 474 U.S. 995 (1985), involved short term investments of working

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[5] Petition at 10 n.11. The Department's reference to several decisions from state courts of last resort which it concedes support the Supreme Court of Virginia's analysis, and the several decisions it cites from lower state courts in other states, need not be addressed herein. *See* S.Ct. Rule 10.1(b).

capital and not, as here and as in *ASARCO*, long term, passive ownership of stock in a discrete business enterprise. In the fourth case cited by the Department, the Supreme Court of Missouri applied the *ASARCO* principles to capital gains income, and based on the facts in that case, determined that the taxpayer and affiliated company were part of the same unitary business. *Williams Cos. v. Director*, 799 S.W.2d 602 (Mo. 1990) (en banc), *petition for cert. filed*, no. 90-1458 (March 18, 1991).[6] Thus none of the foregoing decisions is inconsistent with the application of this Court's legal principles by the Supreme Court of Virginia. The only differences among the cases are their factual bases, thus bringing to the fore this Court's holding that:

> [T]his Court will, if reasonably possible, defer to the judgment of state courts in deciding whether a particular set of activities constitutes a 'unitary business.' "

Container Corp. of America v. Franchise Tax Board, 463 U.S. at 175.

II. The Supreme Court Of Virginia Fully Considered and Correctly Decided the Issues Before It.

The Supreme Court of Virginia discussed at length the legal principles established by this Court in *Exxon Corp., supra, Mobil, supra, F.W. Woolworth, supra,* and

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[6] The court also applied *ASARCO* to interest income received from the parent which the taxpayer admitted was part of the same unitary business. *Id.*

ASARCO, supra.[7] The Supreme Court of Virginia examined Corning's relationship with OCF in light of both those principles and the unique facts of that case in which Corning was prohibited by an antitrust consent decree entered in federal district court from having any management or control over OCF's business activities:

> [Corning] and its employees were prohibited by court order from influencing the business operations of [OCF]. [OCF's] officers did not consult with [Corning] regarding business decisions. [Corning] did not provide financial assistance to [OCF]. [Corning] and [OCF] did not assist each other with personnel needs, or share technological or proprietary information. [Corning] and [OCF] did not engage in any bulk purchase of supplies. [Corning] did not purchase equipment for [OCF]. [Corning] and [OCF] did not use each other's distribution systems to market products. The two companies did not share any professional services. [Corning] received information about [OCF] from through public disseminations that [OCF] distributed to all its shareholders. With the exception of dividend payments [OCF] made to [Corning], there was no flow of funds between the two companies.[8]

The Supreme Court of Virginia concluded that "the 'factors of profitability' arising 'from the operation of the business as a whole' do not evidence the operation of a unitary business" between Corning and OCF.[9]

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[7] Appendix to Petition at 5-11.

[8] Appendix to Petition at 11-12.

[9] Appendix to Petition at 11.

The Department's attempts to distinguish *ASARCO* and related cases from the present case[10] were each fully considered and rejected by the Supreme Court of Virginia. The Department argues that the present case is distinguishable from *ASARCO* due to Corning's other investments, unrelated to OCF.[11] In this vein, the present

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[10] Petition at 9-10.

[11] The Department states "[t]he [Supreme Court of Virginia] accepted but refused to attach any legal significance to the trial court's findings that . . . Corning actively managed a large portfolio of stock and investments as part of its unitary business." Petition at 7, citing Appendix to Petition at 12. The Supreme Court of Virginia only stated "[i]t is true that [Corning] had significant stock holdings in [OCF] and other corporations. However, this fact alone is not sufficient to support a legal conclusion that a unitary business relationship existed between [Corning] and [OCF]. . . . " Appendix to Petition at 12.

The Department also argues here, as it did unsuccessfully below, that the unitary business concept announced in *ASARCO* should be abandoned altogether where the subsidiary corporation is licensed to do any amount of business in the taxing state. Petition at 9-10. This Court has made clear that the critical distinction is not whether the subsidiary does any business in the taxing state, but whether the business activities of the subsidiary, wherever located, have anything to do with the business activities of the parent in the taxing state. *Mobil, supra*, 445 U.S. at 441-2. *See also*, International Paper Co. v. Taxation Division Director, 11 N.J. Tax 147, 164 (N.J. Tax 1990), James v. ITT, 654 S.W.2d 865 (Mo. 1983). The Department, in support of its proposition, cites one case, from an intermediate appellate court in New York, which is presently under appeal, Allied Signal, Inc. v. Commissioner of Finance, 562 N.Y.S.2d 76 (App. Div. 1st Dept. 1990), *appeal pending*, N.Y. Ct.App. Index No. 19702-88, and which involved a dividend payor whose headquarters were located in the taxing state.

case is identical to *ASARCO*. In *ASARCO*, the active management of some subsidiaries as part of the parent company's unitary business did not render all subsidiaries unitary.[12]

The Department also urges that the capital gains and interest income should be considered a part of Corning's unitary business because the income was "an important part of Corning's corporate strategy."[13] This is no different than the "business purpose" test which this Court has consistently rejected:

> This definition of unitary business would destroy the concept. The business of a corporation requires that it earn money to continue operations and to provide a return on its invested capital. Consequently *all* of its operations, including any investment made, in some sense can be said to be "for purposes related to the [corporation's] business." When pressed to its logical limit, this conception of the "unitary business" limitation becomes no limitation at all. When less ambitious interpretations are employed, the result is simply arbitrary.

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[12] Like Corning, ASARCO had interests in a number of subsidiaries. Six of them were wholly owned and they were found after audit to be part of the "unitary" business of ASARCO. *Id.* at 312-3. The Idaho Supreme Court upheld unitary treatment, and ASARCO did not appeal the assessments against these six subsidiaries. *Id.* at 328. ASARCO did appeal the Idaho Supreme Court's decision that income from five other companies in which it held stock was taxable as part of its unitary business. This Court found that each of these businesses were discrete business enterprises and, thus, that income from each of them was not subject to apportionment by Idaho.

[13] Petition at 20.

ASARCO, supra, 458 U.S. at 326 (emphasis in original). *See also F.W. Woolworth, supra,* 458 U.S. at 363-4 (The proper inquiry looks to "the underlying unity or diversity of business enterprise . . . not to whether the nondomiciliary parent derives some economic benefit – as it virtually always will – from its ownership of stock in another corporation. . . . ").

The Department argues that the size of Corning's investment in OCF alone makes OCF a part of Corning's unitary business.[14] The Supreme Court of Virginia considered and rejected this argument.[15] Further, *ASARCO* had established that a subsidiary can be a discrete business enterprise despite the parent's ownership of a substantial percentage of shares in the enterprise. *ASARCO, supra,* 458 U.S. at 321-2 (noting that ASARCO's interest in Southern Peru Copper Corp. ("Southern Peru") totaled 51.5%, but holding that ASARCO's investment in Southern Peru was not part of ASARCO's unitary business).[16]

The Supreme Court of Virginia applied the correct and long established legal standard to the unique factual record of this case. Its resulting unanimous decision was "within the realm of permissible judgment." *Container Corp.,* 463 U.S. at 176 (footnote omitted). Petitioner's claim that the Supreme Court of Virginia wrongly applied this Court's precedent is in error and does not merit review by this Court.

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[14] Petition at 20.

[15] Appendix to Petition at 12.

[16] Corning owned 24% of the common stock of OCF during the relevant period. Appendix to Petition at 4.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

*JOHN M. WOOD
DANIEL K. STEEN
MICHAEL D. SMITH
REED SMITH SHAW & MCCLAY
1200 18th Street, N.W.
Washington, DC 20036
(202) 457-6100

**Counsel of Record for Respondent*

July 3, 1991